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SUPREME COURT, U. S.

In the Supreme Court of the United States

October Term, [illegible]

[illegible], Petitioner

United States of America

On Petition for a Writ of Certiorari to the United States Court of Appeals for the [illegible] Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Erwin N. Griswold,
Solicitor General,
Department of Justice,
Washington, D.C. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-594

FRANK ZIZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in 1963 after a jury trial in the United States District Court for the Northern District of Indiana of fourteen counts charging travel in interstate commerce with intent to carry on an illegal gambling enterprise, in violation of 18 U.S.C. 1952. He was sentenced to concurrent prison terms of five years and fined $10,000. In the course of the trial the government introduced into evidence federal wagering tax forms filed by petitioner, over objection based on the Fifth Amendment privilege against self-incrimination. The court of appeals affirmed on direct review, 338 F.2d 577, and a petition for a writ of certiorari was denied, 381 U.S. 915.

In 1969 petitioner instituted a motion to vacate sentence under 28 U.S.C. 2255, contending that this Court's intervening decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, applied retroactively to invalidate the admission into evidence of the wagering tax forms, and that therefore his conviction should be vacated. The district court denied relief, but the court of appeals reversed (Pet. App. C; 431 F. 2d 913). The government petitioned for a writ of certiorari and, following the decision in *Mackey* v. *United States*, 401 U.S. 667, this Court remanded the case to the court of appeals (402 U.S. 938) for reconsideration in the light of *Mackey*. On remand, the court below unanimously affirmed the district court's denial of petitioner's motion (Pet. App. A).

The opinion of the court of appeals, on which we rely, thoroughly discusses the pertinent authorities and correctly concludes that petitioner is not entitled to relief.[1]

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[1] Compare *Jernek* v. *United States*, No. 34984, C.A. 2, decided June 17, 1971, certiorari denied, October 12, 1971, No. 71-72, where the court of appeals held that evidence seized pursuant to a search warrant charging violations of wagering tax statutes and issued before *Marchetti* and *Grosso* could be used in a trial under different statutes (including 18 U.S.C. 1952) conducted after the *Marchetti-Grosso* decisions. Other

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Erwin N. Griswold,
Solicitor General.

November, 1971.

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courts of appeals' decisions to the same effect are cited in our Brief in Opposition in *Jernek*, a copy of which we are serving on petitioner's counsel.

Lucia v. *United States*, 447 F. 2d 912 (C.A. 5), on which petitioner relies (Pet. 14), is distinguishable. That case held that the government could not bring suit to collect federal wagering taxes after the limitations period even though no wagering tax return was filed and thus the limitations bar ordinarily would not apply, since the effect would be to penalize the taxpayer for the primary conduct protected under *Marchetti-Grosso*, the failure to file a wagering tax return.